No. 11,831

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ANTONE A. PAGLIERO, JOHN B. PAGLIERO and ARTHUR J. PAGLIERO, co-partners doing business under the fictitious firm name and style of Technical Porcelain & Chinaware Company,

Appellants,

vs.

MERCHANTS FIRE ASSURANCE CORPORATION OF NEW YORK (a corporation),

Appellee.

APPELLANTS' OPENING BRIEF.

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APPELLANTS' OPENING BRIEF.

This is an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from a final judgment of the United States District Court for the Southern Division of the Northern District of California.

JURISDICTION OF THE DISTRICT COURT AND OF THIS HONORABLE COURT.

This action was originally brought by appellants in the Superior Court of the State of California, in and for the County of Contra Costa, to recover upon a policy of fire insurance issued to appellants by appellee. Upon petition of appellee it was subsequently removed to the District Court, presumably under Section 71, 28 U. S. Code. The action being of a civil nature, the parties citizens of different states, and the amount in controversy in excess of $3000.00, exclusive of interest and costs,[1] the District Court had jurisdiction under Section 41(1), 28 U. S. Code.

The appellate jurisdiction of this Honorable Court rests upon Section 225, 28 U. S. Code, which gives the Circuit Courts of Appeals of the United States jurisdiction to review by appeal final decisions of the District Courts in all cases save where direct review may be had in the Supreme Court under Section 345, 28 U. S. Code. No direct review of this case can be had in the Supreme Court under Section 345, 28 U. S. Code.

The notice of appeal to this Honorable Court (see p. 31 of printed record) was filed on December 5, 1947, within thirty days of the entry of the judgment in the District Court.

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[1]See complaint, page 2 of printed record.

STATEMENT OF THE CASE.

In June, 1944, appellee, who will hereinafter sometime be referred to as Merchants, issued a policy of fire insurance to appellants, who will hereinafter sometime be referred to as Pagliero. The policy was in the amount of $15,000.00, and was to run for a term of three years. In the early part of 1945, Otis & Browne, Inc., became Pagliero's insurance brokers and, in February of that year, acting as such brokers, they caused Merchants to modify rather extensively the coverage of the policy previously issued by Merchants to Pagliero. It may in fact be said that Otis & Browne procured for Pagliero what amounted to a new policy. At about the same time, and still acting as Pagliero's brokers, Otis & Browne either procured entirely new policies for Pagliero in companies in which Pagliero had previously not been insured, or caused companies in which Pagliero was insured at the time to modify the coverage of their policies as had been done by Merchants.

The policy, like all California standard form fire insurance policies, contained a cancellation clause providing that it might be cancelled by Merchants "by giving five (5) days' written notice of cancellation *to the insured*". (Italics supplied.) It admittedly contained no other clause under which it could in any other way be cancelled by Merchants.

For the next fourteen months Merchants had no dealings whatever with either Pagliero or Otis & Browne. On April 10, 1946, however, Merchants wrote to Otis & Browne asking them to cancel the policy.

That letter remained unanswered and Merchants accordingly wrote again to Otis & Browne on May 3, 1946, asking them to "follow up" on the letter of April 10th. Otis & Browne then answered that Merchants could "close your file" as the policy had been "replaced as of April 10, 1946". Upon receipt of Merchants' first letter, Otis & Browne had in fact procured from the Home Fire and Marine Insurance Company a policy in Pagliero's name covering the same property and in the same amount as that of Merchants.

Pagliero did not learn until *after* May 22, 1946, that Merchants had requested Otis & Browne to "cancel" and that Otis & Browne had "replaced" the policy. On that day, however, the insured property was damaged by fire in the sum of almost $465,000.00. To cover that loss Pagliero had policies which, including the policy of Merchants and that of the Home Fire and Marine Insurance Company, amounted to a total face value of $315,000.00.

Pagliero made claim under all policies and the Home Fire and Marine Insurance Company paid its share of the loss. Merchants, however, denied liability under its policy on the ground that it had been cancelled before the fire, and this action ensued.

Merchants admittedly did not comply with the cancellation clause. Since Pagliero's right to recover depends upon whether or not the policy was in effect at the time of the fire and since the policy contained no other clause under which it could in any other way be cancelled by Merchants, Pagliero can be said to have

made a *prima facie* case by establishing that he was not given by Merchants the five days' written notice of cancellation provided for in the policy. In an attempt to overcome this *prima facie* case, Merchants raised certain issues by way of an affirmative defense. It was stipulated before the trial that these issues were the only issued involved and, as to them, the burden of proof was of course upon Merchants.

Thus, the case was virtually tried on an agreed statement of facts, with the issues stipulated to be as follows:

> 1. The extent of the authority of Otis & Browne, Inc. as insurance brokers for plaintiff.
>
> 2. The legal effect of the acts and conduct of Otis & Browne, Inc. in obtaining a policy of insurance in a similar amount on the same property with the Home Fire & Marine Insurance Co., after their receipt of defendant's request for cancellation of its policy.
>
> 3. The legal effect of plaintiffs' having made claim for and having collected the full amount due under the said policy of the Home Fire & Marine Insurance Co."
>
> (See printed record, p. 15.)

The trial Court gave judgment for Merchants after finding that all the acts of Otis & Browne were performed within the scope and authority of their employment as Pagliero's insurance brokers. The Court concluded that there had been a "substitution" of

policies and that the policy of Merchants was no longer in effect at the time of the fire.

The Court also concluded that Pagliero ratified after the fire the acts of Otis & Browne and the "substitution" of one policy for the other, without making it clear, however, how acts performed by an agent *within* the scope and authority of his employment can be *ratified* by the principal.

It is appellants' contention that the acts of Otis & Browne were not performed within the scope and authority of their employment; that they were not ratified after the fire; that there was no "substitution" of policies, and that the policy of Merchants was in effect at the time of the fire.

SPECIFICATION OF ERRORS.

(1) The Court erred in finding and holding that the acts of Otis & Browne were performed within the scope and authority of their employment as Pagliero's insurance brokers.

(2) The Court erred in admitting in evidence defendant's Exhibits B and C, as these exhibits were not shown to have been sent by Merchants to an agent of Pagliero authorized to receive and act upon them.

Exhibit "B" is as follows:

"(Letterhead) Merchants Fire Assurance
Corporation of New York

April 10, 1946

Otis & Browne, Inc.
233 Sansome Street
San Francisco, Calif.

Gentlemen:

Re: Policy #8604
Technical Procelain Co.

Will you kindly cancel this policy and return it to us for pro rata cancellation?

The Company has requested us to retire from the liability because we are no longer willing to accept this classification. If you would prefer, we can send cancellation notice direct to the assured. However, we will not do so unless you specifically instruct us.

Yours very truly,
/s/ H. F. Rohrbach
Manager"

(p. 54 of printed record.)

Exhibit "C" is as follows:

"(Letterhead) Merchants Fire Assurance
Corporation of New York

May 3, 1946

Otis & Browne, Inc.,
233 Sansome St.,
San Francisco, Calif.

Gentlemen:

Re: Policy #8604
Technical Porcelain Co.

We are following up a letter written to you on April 10 asking for cancellation of this policy.

We understood that you were going to relieve us of liability as soon as possible although no definite date was set for the termination.

Will you kindly follow this up and endeavor to have our policy returned within the next ten days?

Yours very truly,
/s/ H. F. Rohrbach,
Manager

(Notation): You may close your file as this has been replaced as of April 10, 1946. Policy is at Mechanic's Bank, Richmond, and will require some time to secure unless you wish to send cancellation notice dated 10 days prior to April 10, 1946."

(p. 56 of printed record.)

The following objections were made by Pagliero to the admission of Exhibit "B":

"Mr. Hauerken. We object to the relevancy of that document, your Honor. I refer your Honor to the case of Lauman v. Concordia Fire Insurance Co., in which it was held substantially that a firm whose practice and custom, in relation to the cancellation of insurance policies, is to protect the assured in some other company, if possible, and to notify him of the cancellation of his policy by either sending him a new policy or advising him that they cannot replace it, and requesting a return of the policy, are mere brokers, and as such are without authority to accept notice of cancellation.

And the case goes on further to say that an agency to procure insurance is ended when the

policy is procured and delivered to the principal, and the agent has no power after the policy is so delivered to consent to a cancellation, or to accept notice of an intended cancellation by the insurer; and that the evidence of usage to give notice to a broker is inadmissible where the policy requires notice to the insured.

There are a number of cases on that point. I just cited one to show the attempt to cancel through the medium of a broker is legally without effect.

The Court. The objection is overruled."

(pp. 52-53 of printed record.)

The same objection was made by Pagliero to the admission of Exhibit "C":

"The Court. I presume you make the same objection?

Mr. Hauerken. The same objection as to the last document.

The Court. Overruled. Received."

(p. 56 of printed record.)

(3) The Court erred in holding that Pagliero ratified the acts of Otis & Browne and the replacement of one policy by the other.

(4) The Court erred in holding that there was a "substitution" of one policy for the other.

ARGUMENT.

(1) THE COURT ERRED IN FINDING AND HOLDING THAT THE ACTS OF OTIS & BROWNE WERE PERFORMED WITHIN THE SCOPE AND AUTHORITY OF THEIR EMPLOYMENT AS PAGLIERO'S INSURANCE BROKERS.

There is no evidence in the record tending to show that Otis & Browne were either specifically or generally authorized to do those acts. Nor is there any evidence in the record tending to show that they were general insurance agents for Pagliero. On the contrary, the only evidence in the record shows that they were only Pagliero's insurance brokers. As such, and without prior additional authority, they were *not* authorized to do the acts which the Court found that they were authorized to do.

There is some conflict in the evidence on the question of whether written authority was given Otis & Browne by Pagliero. Mr. Browne, President of Otis & Browne, testified that no such authority was given. Mr. Pagliero, appellants' managing partner, testified that no such authority was given. The credibility of his testimony to that effect is enhanced by his testimony as to his reasons for not giving his new brokers any written authority. Mr. Pagliero testified as follows:

> "Q. (by Mr. Hauerken). Did you ever give Otis & Browne any writing with respect to your insurance?
>
> A. No, sir, for the simple reason of the experience we had with Myer Lightner Company and the suit we had with Myer Lightner Company.

Q. Myer Lightner were your previous brokers?

A. That is right.

Q. And you had given them some sort of a letter?

A. That is right, appointing them as exclusive brokers, and we had some misunderstanding on that, so I in turn took it upon myself that I would never give anybody exclusive broker rights.

Q. And Myer Lightner sued you?

A. That is right.

Q. And we compromised that suit?

A. That is right.

Q. And that is the reason you wouldn't give any letter to Otis & Browne or any one else?

A. That is right, sir."

(See printed record p. 75.)

As against the testimony of the two persons who knew best, Merchants produced the testimony of its underwriter who *thought* that he remembered having been shown in February, 1945, some written authorization given Otis & Browne by Pagliero. That conflict, however, does not have to be resolved, for it is a conflict only as to whether a writing was given. On the more important question of the extent of Otis & Browne's authority, whether it be written or not, the evidence is without conflict. *The underwriter himself* was quite specific as to the contents of the writing allegedly shown him by Otis & Browne; that writing *went no further than to appoint them Pagliero's insurance brokers.* (See printed record p. 60.)

It is of course admitted that Otis & Browne were Pagliero's insurance *brokers* at the time. There is,

however, no evidence that they were, as Merchants contended in the trial Court and will undoubtedly contend before this Honorable Court, "general insurance *agents*" for Pagliero. On the contrary, the evidence shows without conflict that they were not such general insurance agents. From the evidence in the record, and it must be remembered that upon that issue the burden of proof is upon Merchants, it cannot possibly be inferred that the actual authority given Otis & Browne was broader.

The question then presents itself as to whether an insurance broker, whom his principal simply empowers to procure a policy, becomes by operation of law empowered to cancel that policy. It is well settled that the law does not increase his authority, as Merchants would have it increased, and that he remains empowered to do only what his principal authorizes him to do and no more.

Since the present case is before this Court simply on the ground of diversity of citizenship, the California law is the applicable law. In the case of *Lauman v. Concordia Fire Insurance Company,* 50 Cal. App. 609, 195 P. 951, the defendant insurance company contended, as Merchants does in this case, that its policy had been cancelled before the fire. The answer to that contention depended upon the extent of the authority of plaintiff's broker, to whom the company had given notice of cancellation. The Court held that the broker was not authorized to receive notice of cancellation on the ground that *"an agency to procure insurance is ended when the policy is pro-*

cured and delivered to the principal, and the agent has no power after the policy is so delivered to consent to a cancellation or to accept notice of an intended cancellation by the insurer." (50 Cal. App. at p. 618; italics supplied; to the same effect are: *Emery v. Pacific Employers Ins. Co.,* 8 Cal. (2d) 663, 672, 67 P. (2d) 1046; *Quong Tue Sing v. Anglo Nevada Assur. Corp.,* 86 Cal. 566, 571, 25 Pac. 58; *Lauman v. Springfield Fire etc. Ins. Co.,* 184 Cal. 650, 652, 195 Pac. 50; *Hooker v. American Indemnity Co.,* 12 Cal. App. (2d) 116, 120; 54 P. (2d) 1128; *Cronenwett v. Iowa Underwriters etc. Co.,* 44 Cal. App. 571, 575, 186 Pac. 824; *Tarleton v. DeVeuve* (C.C.A. 9th), 113 Fed. (2d) 290, 299.) In the *Quong Tue Sing* case, cited supra, the Court used language which seems made to order for the present case:

> "There is an entire lack of any evidence even tending to show that Brandon (the broker) had any authority * * * to accept a cancellation of it on any terms, unless such agency is established by a mere showing that he was the appellant's agent in procuring the insurance. That an agent authorized to procure insurance is not thereby made the agent of the insured to cancel the policy is well settled."
>
> (86 Cal. at 571.)

Nor can it be contended that Otis & Browne had at least ostensible authority to act upon a request for cancellation or to otherwise agree to a cancellation of the policy. It is elementary that the question of whether an agent has ostensible authority to do a certain act is to be determined by the conduct or dec-

larations of the principal and not by the conduct or declaration of the agent. (*Pacific Ready-Cut Homes, Inc. v. Seeber,* 205 Cal. 690, 694, 272 Pac. 579; *Hansen v. Farmers Auto. Inter-Ins. Exch.,* 139 Cal. App. 388, 393, 34 P. (2d) 188; *Christian v. Rice Growers Assn.,* 50 Cal. App. (2d) 617, 621, 123 P. (2d) 534.) We must accordingly again look at the facts to determine what may have been done or said by Pagliero that led Merchants to believe that Otis & Browne were authorized to do more than procure a modified policy from Merchants. The most that was done by Pagliero was to give Otis & Browne written authority to act as his insurance brokers. That written authority (if any there was) was shown to Merchants and Merchants was accordingly led to believe that Otis & Browne were authorized, as in fact they were, to procure for Pagliero a modified policy of fire insurance. Pagliero did nothing else in the next sixteen months that might lead Merchants to believe that Otis & Browne had any broader authority. In fact Pagliero had no dealings whatever with Merchants until after the fire. Nor did Otis & Browne themselves have any dealings with Merchants, with respect to Pagliero's policy, for the fourteen months that followed their procurement of a modified policy. On April 10, 1946, however, a letter was sent; not by Pagliero to Merchants; not by Otis & Browne, purporting to act for Pagliero, to Merchants; but by Merchants to Otis & Browne. In other words, fourteen months after Otis & Browne had procured a policy for Pagliero, Merchants sought them out with a request that that policy be cancelled.

Merchants now contends that it was led to believe that the extent of Otis & Browne's authority was much broader than it was in fact. We have shown that Pagliero did nothing to lead Merchants to such a belief and that such a belief would have been justified only to the extent that it was induced by Pagliero. We now propose to show that, in April and May, 1946, Merchants itself did not believe that Otis & Browne were authorized to act upon a request for cancellation or otherwise agree to a cancellation of the policy. All that Merchants knew was that Otis & Browne were Pagliero's brokers and that as such they had been authorized, fourteen months previously, to procure a modified policy for Pagliero. Merchants also knew the law applicable to such a situation and was undoubtedly familiar with the case of *Lauman v. Concordia Fire Insurance Company,* cited supra, and the numerous other cases to the same effect. On April 10, 1946, knowing the facts and the law applicable to those facts, Merchants wrote to Otis & Browne asking them to cancel the policy. Had the letter been sent directly to the assured or to an agent of the assured authorized to receive a notice of cancellation, it would simply have said that the policy would be cancelled five days after the receipt of the letter. Had the letter been sent to an agent authorized to receive notice of cancellation, Merchants would not have added:

> "If you would prefer, we can send cancellation notice direct to the assured."

The letter of April 10, 1946, in effect told Otis & Browne that Merchants was aware that nothing could be done by Otis & Browne alone that would result in the cancellation of the policy, and that, to be effective, notice of the cancellation had to be given *to the assured.* Since the policy was procured or at least modified through Otis & Browne, Merchants may have felt that, from the standpoint of a sound business policy, Otis & Browne should not be by-passed. Accordingly, Merchants offered them an opportunity to break the news to the assured.

At this stage of our discussion of the case, we are not concerned with anything that may have been done by Otis & Browne following the receipt of that letter. It is sufficient to point out that they did not convey to Pagliero, until after the fire, the message which Merchants had asked them to convey.

On May 3, 1946, Merchants again wrote to Otis & Browne asking them to "follow up" on its letter of April 10th. Nothing in that second letter is evidence of any belief on the part of Merchants that it was writing to an agent of Pagliero whom Pagliero had previously authorized, either actually or ostensibly, to accept a notice of cancellation or otherwise agree to a cancellation of the policy. Under the terms of the policy, however, notice of cancellation was to be given to the assured *and to no one else.* Since Otis & Browne did not convey the message to Pagliero and since Pagliero never authorized them to receive such a message and keep it to themselves, the conclusion is in-

escapable that the cancellation clause was not complied with.

To complete the picture as to the extent of Otis & Browne's authority, there remains to be pointed out that nothing that Otis & Browne did or wrote as a result of either of Merchants' letters can be regarded as either increasing their actual authority or as giving them any ostensible authority which they previously did not possess. Finally, it may be noted that Otis & Browne never led Merchants to believe that its message had been conveyed. While their answer to Merchants' letter of May 3, 1946, advised Merchants that the policy had been "replaced" in effect it also notified Merchants that its message had not been conveyed to Pagliero and accordingly suggested that Merchants might "wish to send cancellation notice" to Pagliero.

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(2) THE COURT ERRED IN ADMITTING IN EVIDENCE DEFENDANT'S EXHIBITS B AND C, AS THESE EXHIBITS WERE NOT SHOWN TO HAVE BEEN SENT BY MERCHANTS TO AN AGENT OF PAGLIERO AUTHORIZED TO RECEIVE AND ACT UPON THEM.

The letters sent by Merchants to Otis & Browne were admissible in evidence only if relevant and they obviously were relevant only if sent to an agent of Pagliero authorized to receive and act upon them, or if they had in fact been communicated to Pagliero before the fire. It is conceded that they were not communicated before the fire and we have shown that Otis & Browne did not have the requisite authority.

In *Lauman v. Concordia Fire Insurance Co.,* 50 Cal. App. 609, 195 Pac. 951, for example, after holding that a broker is not authorized to receive and act upon a notice of cancellation, the Court added that "evidence of a usage to give notice to a broker is inadmissible, where the policy requires notice to the insured." (50 Cal. App. at p. 618.) It seems clear that if evidence of such a usage is inadmissible, evidence of the giving of the notice itself is even less admissible.

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(3) THE COURT ERRED IN HOLDING THAT PAGLIERO RATIFIED THE ACTS OF OTIS & BROWNE AND THE REPLACEMENT OF ONE POLICY BY THE OTHER.

There is no evidence in the record that Pagliero in fact ratified the cancellation of the policy of Merchants. On the contrary the record makes it clear that Pagliero emphatically expressed his intention not to ratify the cancellation. (See printed record p. 74.) The holding of the trial Court must accordingly be taken to mean either that the unauthorized procurement of the new policy by Otis & Browne automatically terminated the liability of Merchants on its policy, or that Pagliero was called upon to elect between the two policies and, as a matter of law, could not at the same time ratify Otis & Browne's unauthorized procurement of the new policy and decline to ratify their unauthorized cancellation of the old policy.

It is true that a well settled rule in the law of agency precludes a principal from retaining the bene-

fits of a transaction which his agent was not authorized to enter into, without at the same time shouldering the burden of that transaction. That rule, however, does not prevent Pagliero from retaining both policies. It is intended to protect the person with whom the agent dealt and means only that the principal must ratify the whole transaction *with that person* if he wishes to ratify any part of it. He cannot, for example, retain the proceeds of a sale and disclaim unauthorized warranties without which his agent could not have made the sale. Nor could Pagliero retain the benefits of the transaction between his brokers and The Home Fire and Marine Insurance Company without paying the price which his brokers contracted to pay for those benefits and without being bound by whatever warranties they made to induce that company to issue its policy. Nor could Pagliero ratify the transaction between his brokers and Merchants to the extent of making claim to a refund of the premium previously paid on Merchants' policy, without at the same time ratifying the cancellation of that policy upon which the right to a refund is based.

It is not contended, however, that Merchants sought to cancel its policy only on condition that Pagliero would procure another. On the contrary Merchants sought to cancel irrespective of whether Pagliero would be able to procure another policy. In fact, it is probable that Merchants' decision to cancel would have been bolstered, had it learned that no one else cared to insure Pagliero's property. Nor is it con-

tended that The Home Fire and Marine Insurance Company issued its policy only on the condition that Merchants' policy was no longer effective.[2] There is accordingly no connection whatever between the two transactions, except in the minds of Pagliero's brokers, who seem to have thought that they had to enter into one transaction to protect their principal from what they regarded as the effects of the other. The purpose of an agent who enters into an unauthorized transaction on behalf of its principal is, however, immaterial. The principal can ratify the transaction, irrespective of the agent's purpose, so long as that purpose was not, in some way, made a part of the transaction.

Moreover, it is not in their transaction with Merchants that Otis & Browne had the purpose upon which Merchants insists so much, but in their transaction with The Home Fire and Marine Insurance Company. It may well be that, if purposes were material, The Home Fire and Marine Insurance Company could contend that its policy was issued to replace that of Merchants and was accordingly to be effective only if a replacement was actually needed. No such contention can be made by Merchants, for it sought an unconditional cancellation of its policy, to which Otis & Browne unconditionally agreed, al-

[2]It must be emphasized that the present case is not a case of over-insurance, but a case of extreme under-insurance. Thus, it can neither be said that Pagliero is trying to recover more than his loss, nor that either Merchants or The Home Fire and Marine Insurance Company might have declined to insure Pagliero, had it known that he carried both policies, for fear that he might be careless about protecting his property from fire.

though they were not authorized to enter into such an agreement, conditionally or otherwise. No string was attached to that agreement when it was made. Accordingly Merchants cannot now tie it to another agreement and compel Pagliero to ratify or reject them together. It must stand or fall on its own, depending upon whether (1) Otis & Browne were authorized to enter into it, or (2) it was ratified by Pagliero.

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(4) THE COURT ERRED IN HOLDING THAT THERE WAS A "SUBSTITUTION" OF ONE POLICY FOR THE OTHER.

We must confess not to be certain whether the conclusion of the trial judge that there was a "substitution" of one policy for the other is a mere restatement of his finding that Otis & Browne were authorized to do what they did, or of his conclusion that Pagliero ratified what was done by Otis & Browne, or whether it is to be taken as a separate and distinct ground on which the trial judge rested his judgment. Nothing need be added to this brief, if "substitution" means only previous authority or ratification, for we have already established that in this case there was neither previous authority nor ratification. It is necessary to establish, however, that there is no separate and distinct doctrine of substitution in the law of insurance, and that the Court erred in so far as it purported to rely upon such a doctrine to support a judgment in favor of Merchants.

We already pointed out that the action is before this Court on the ground of diversity of citizenship.

There is accordingly no federal question involved and the applicable law is that of the State of California. Unfortunately, there are no California cases in point. It is true, that at the trial, Merchants purported to rely upon several California cases. None of these cases are in point, as we will show in our reply brief, should Merchants purport to rely upon them on appeal. Although persuasive authority must therefore be sought in other jurisdictions, it is well to remember certain basic principles of California insurance law, for they may help us determine which of several cases from other jurisdictions California would be most likely to follow.

It is now settled in California that a policy of insurance is to be regarded as a commodity rather than as an ordinary contract and that the rules of construction applicable to ordinary contracts do not apply to the construction of insurance policies. (*Kavanaugh v. Franklin Fire Ins. Co.,* 185 Cal. 307, 314, 197 Pac. 99; *Glickman v. New York Life Ins. Co.,* 16 Cal. (2d) 626, 632, 107 P. (2d) 252; *Speegle v. Board of Fire Underwriters,* 29 Cal. (2d) 34, 44, 172 P. (2d) 867.) In fact, a policy is now construed so strongly against the insurer, that a complete answer to Merchants' contention lies in the fact that Merchants itself provided that the only way in which it could cancel its policy would be by giving five days' written notice to the insured, thereby indicating that no other method would be sufficient, be it called "substitution" or any other name.

Both the trial Court and Merchants seem to have placed considerable reliance upon the case of *Finley v. New Brunswick Fire Ins. Co.,* 193 Fed. 195. This case was decided in 1911, long before the *Kavanaugh* and *Glickman* cases, cited supra. We need not emphasize that, although it is entitled to respect, being the decision of a District Court, it is not binding upon this Honorable Court. At first glance the case seems to announce a doctrine of "substitution" as broad as that contended for by Merchants. It then appears, however, that the three cases relied upon by the Court in support of that doctrine do not support it at all. These cases will be reviewed below. How much strength is thus left to the *Finley* case need not be determined, for it is, on its facts, distinguishable from our case on at least two grounds:

(a) As is made clear by a reading of the companion case of *Finley v. Western Empire Ins. Co.,* 69 Wash. 673, 125 Pac. 1012, *the agent to whom notice of cancellation was given was authorized to keep the property insured up to a certain amount.* His authority was accordingly much broader than that of Otis & Browne in our case. In fact, it was broad enough to support his agreement to cancel one policy and his procurement of another, so that the whole discussion of the District Court about ratification of the "substitution" appears to be at best pure dictum.

(b) The agent to whom the defendant in the *Finley* case gave notice of cancellation was *not only acting as broker for the plaintiff, but also as agent*

for the defendant; so that, when he procured a new policy for the plaintiff, he was protecting not only the plaintiff, but also the defendant, and the new contract was accordingly subject to the condition that the plaintiff relinquish the old one. In our case, however, Otis & Browne were not Merchants' agents, so that by no stretch of the imagination can it be said that the contract with the Home Fire & Marine Insurance Company was subject to the condition that Pagliero relinquish his contract with Merchants, or that Pagliero did relinquish that contract by making claim under the Home Fire and Marine policy.

Moreover, the Court was undoubtedly influenced in the *Finley* case by the fact that the plaintiff was over-insured; in our case, however, Pagliero will have at most three hundred fifteen thousand ($315,000.00) dollars to cover a loss of over four hundred sixty thousand ($460,000.00) dollars. In the final analysis, however, it must be conceded that *some of the language* in the *Finley* case, as *distinguished from the holding in the case,* which we have shown not to be in point, supports Merchants' position. To the extent that it does support that position, we believe it to be as unsound as we have shown that position to be when we previously analyzed it.

The case of *Arnfeld v. Guardian Assurance Company of London,* 172 Pa. 605, 34 Atl. 580, is the first case relied upon by the District Court in *Finley v. New Brunswick Fire Ins. Co.* That case, decided in 1896, seems to be a case in which the assured was trying to recover more than his loss. Although the

facts are not very clear, it appears that the assured was denied recovery against the first company (Merchants in our case), after having collected from the second company (The Home Fire & Marine Ins. Co. in our case), on the ground that "no party ought to be allowed to recover twice for the same debt". (34 Atl. at 581.) The case is further distinguishable on the ground that *"he (the agent) acted throughout for the plaintiffs and for both companies, and communicated with both; and all consented, and ratified his acts"*. (34 Atl. at 581. Italics supplied.) The opinion does not disclose the extent of the agent's authority, nor whether he was also the agent of the insurance companies, although the last quotation seems to indicate that he was. Nor does it appear whether the plaintiff "consented and ratified" before or after the fire. In this respect the case differs from the *Finley* case in which it does appear that the plaintiff knew nothing of what the agent did until after the fire. In the *Arnfeld* case, however, the plaintiff relied on the fact that the five days' period had not elapsed since notice had been given the agent, rather than on the fact that he did not know that notice had been given. Finally the opinion, which incidentally does not cite a single case, does not even disclose to whom the notice of cancellation was to be given under the policy. In any event, *the case is distinguishable from our case, since Pagliero in our case neither "consented" nor "ratified"*. The Supreme Court of Pennsylvania itself distinguished it on that ground in *Scheel v. German American Insurance Company*

(1910), 228 Pa. 44, 76 Atl. 507, a case to which further reference will be made.

The case of *Larsen v. Thuringia American Ins. Co.*, 208 Ill. 166, 70 N. E. 31, is the next case relied upon by the District Court in *Finley v. New Brunswick Fire Ins. Co.* Decided in 1904, that case is again distinguishable from our case on its facts. *The plaintiff expressly ratified the cancellation* and testified himself that he had told the agent after the fire that "it did not make any difference to him, just so he got his $2,500 of insurance". (208 Ill. at 168.) The facts disclose that the agent met the insured after the fire, explained to him what he had done, and requested the first policy in exchange for the second one, "to which appellant assented and which was done". (208 Ill. at 169.) The change of heart of the assured is not explained; nor does it interest us. It is enough to point out that in our case Pagliero never ratified Otis & Browne's agreement that Merchants' policy be cancelled.

The case of *White v. Insurance Company of New York* (1899), 93 Fed. 161, is the third case relied upon by the District Court in *Finley v. New Brunswick Fire Ins. Co.* It is distinguishable from our case on the ground that *the broker was actually authorized to keep the plaintiff insured up to a certain amount and "from time to time to substitute insurance for that originally taken out".* (Italics supplied.) (93 Fed. at 163.) On the witness stand the plaintiff in the *White* case expressly disclaimed having ratified the taking of additional insurance by his broker in excess

of the authorized amount, and the Court stated that there was abundant evidence that he intended to adopt both the cancellation of the first policy and the procurement of the second policy. It may also be mentioned that the plaintiff was over-insured.

The case of *Strauss v. Dubuque Fire & Marine Insurance Company,* 132 Cal. App. 283, 22 P. (2d) 582, is another case upon which both the trial Court and Merchants seem to have placed considerable reliance. That case is analogous to ours only in the sense that it involves an action by a policy holder against an insurance company. The grounds of decision, however, have nothing whatever to do with our case. The plaintiffs were denied recovery (a) because they were not the owners of the property described in the policy, and (b) on account of material misrepresentation in obtaining the policy and false statements in the proofs of loss. The Court also held that another policy was substituted for and accepted by the plaintiffs in lieu of that of the defendant. Nothing is said, however, in the opinion as to how the "substitution" took place, except that it took place *by consent of the parties before the fire.* It does not appear whether a broker or agent was at all involved in the transaction and, if one was involved, what was the extent of his authority. The Court seems to have regarded the whole question of "substitution" as not being sufficiently important, in view of the other grounds of decision, to warrant a statement of the evidence bearing upon it and simply stated that the finding of "substitution" was supported by the evidence. Under the circumstances, the

case can be helpful to neither side in the present action.

It may finally be noted that neither of the two cases cited in the *Strauss* case in connection with the question of substitution supports defendant's position in the present case. The case of *Stevenson v. Sun Insurance Office,* 17 Cal. App. 280, 119 Pac. 529, *involves only one insurance policy* and accordingly has nothing whatever to do with our present problem. The question involved was that of the extent of a broker's authority. The plaintiff's contention was that the broker was his agent for the purpose only of placing certain insurance and that he was not authorized to cancel any policy. The Court held, however, that, although the general rule as to a broker's authority is what the plaintiff contended it to be, *authority to cancel had in fact been conferred upon the broker.* In *New Zealand Insurance Company v. Larson Lumber Company,* 13 F. (2d) 374, *the broker,* who incidentally was also the agent for both the first and the second company, *had actual authority* from the insured *to accept and act upon a notice of cancellation.*

It is clear, therefore, that the cases relied upon by the trial judge (see p. 17, printed record) do not announce a separate doctrine of substitution under which the procurement of one policy automatically terminates another. Nor have we found any other cases that do. There are, however, other cases that support our position.

In *Royal Exchange Assurance of London v. Luttrell,* 99 Colo. 492, 63 P. (2d) 1240, decided in 1936 by the Supreme Court of Colorado, the plaintiff recovered upon the first policy as against the contention that, by bringing another action upon the second policy, he had ratified his broker's attempt to cancel the first one. The broker, just as in our case, had the authority only to procure, which the Court held not to include the authority to accept a notice of cancellation or otherwise agree to a cancellation of the policy. The Court added that in any event "ratification after the fire would have been ineffectual because the moment the fire loss occurred defendant's liability became absolutely fixed." (63 P. (2d) at 1243.)

In *Wilson v. National Ben Franklin Fire Insurance Company* (1924) (Mo. App), 246 S. W. 338, the insured recovered on the first policy, notwithstanding the fact that the agent who purported to have cancelled it and replaced it with another policy was also the agent for both insurance companies. The Court based its decision on the grounds that, since the assured had no notice of the acts of the agent until after the fire, the cancellation clause had not been complied with and the policy was accordingly still in effect. The Court further held that the assured had not lost his right of action against the first company by bringing suit against the second company. Since the policy was in force, the defendant's liability attached at the time of the fire and nothing that was done thereafter could invalidate the rights of the assured. The Court finally stated that nothing that

was done thereafter could operate by way of estoppel, since it did not cause the defendant to change its position in any way.

In *Peterson v. Hartford Fire Insurance Company,* (1903), 111 Ill. App. 466 (reversed on other grounds in 209 Ill. 112, 70 N.E. 757), the Court allowed recovery against the first company in the standard situation in which the insured learned only after the fire of the purported cancellation and of the procurement of a new policy. In answering a contention of the first insurance company, the Court significantly stated that it was immaterial, so far as that company was concerned, whether the second policy was valid or not.

Even as early as 1904 it was held in a Federal Court in a situation such as that presented in our case, that the assured could recover upon the first policy, since the cancellation clause had not been complied with. The broker in that case, just as Otis & Browne in our case, was not authorized to consent to the cancellation of the policy. See *Phoenix Insurance Company v. Kerr,* 129 Fed. 723.

A similar result was reached in *Baker v. North River Insurance Company* (1923), 112 Kan. 530, 212 Pac. 118. The Court said:

> "Nothing that plaintiff did . . . in an attempt to collect the loss from the American Insurance Company (the second company) estops him from claiming under this policy, for the reason that nothing done by him in that respect altered the

> position of the defendant, or furnished any ground for estoppel." 212 Pac. at p. 120.

The Court added that the rights and liabilities of the plaintiff and the defendant had become fixed when the loss occurred and that nothing that was done thereafter could alter that fact.

A similar result was reached in *Scheel v. German-American Insurance Company,* 228 Pa. 44, 76 Atl. 507, the case in which, in 1910, the Supreme Court of Pennsylvania distinguished the *Arnfeld* case, cited supra. The plaintiff was allowed to recover from the first company notwithstanding the fact that he had previously collected from the second company.

A similar result was reached in *Hendricks v. Continental Insurance Company of City of New York,* (1936), 121 Pa. Super. 393, 183 Atl. 363. The insured recovered against the first company, notwithstanding the fact that the second company had previously paid him under its policy. The Court held that the cancellation of a policy could be effected only through strict compliance with the cancellation clause in that policy. The Court stated:

> "It matters not that the Fire Association of Philadelphia (the second company) admitted liability. That was not detrimental to the appellant nor could it prejudice the plaintiff." 183 Atl. at 366.

Although there are no California cases precisely in point, there are numerous cases in California holding that the cancellation clause in a policy of insurance

must be strictly complied with, before the insurance company may claim that the policy is cancelled. *Quong Tue Sing v. Anglo-Nevada Assur. Corp.,* 86 Cal. 566, 25 Pac. 58; *Lauman v. Springfield Fire etc. Ins. Co.,* 184 Cal. 650, 195 Pac. 50; *Tarleton v. DeVeuve* (C. C. A. 9th), 113 Fed. (2d) 290. Having failed to comply with the cancellation clause in its policy Merchants should now be reminded by the Court that the purpose of insurance is to insure and that the very contingency occurred in which it promised to protect Pagliero from loss.

CONCLUSION.

Since the cancellation clause was not complied with and Pagliero neither agreed to a cancellation of the policy, nor authorized Otis & Browne to agree to such cancellation, nor ratified any agreement cancelling it, the judgment should be reversed.

Dated, San Francisco, California,
March 20, 1948.

Respectfully submitted,
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